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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

CHARLES STEWART STOLL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. 76-1244

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Charles Stewart Stoll, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on January 6, 1977.

I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and a copy of the opinion is printed in Appendix A hereto, *infra*, page 1a. A copy of the judgment of the United States District Court for the District of Arizona is printed in Appendix A hereto, *infra*, page 6a. A copy of the order of the United States Court of Appeals for the Ninth Circuit is printed in Appendix B hereto, *infra*, page 1b.

II. JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A, *infra*, page 1a) was entered on January 6, 1977. A timely motion for a rehearing was denied on February 8, 1977 (Appendix B, *infra*, page 1b). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

III. QUESTIONS PRESENTED

A. Where lack of *mens rea* is an issue in a prosecution for violation of 18 U.S.C. § 111 does *United States v. Feola* require, in appropriate circumstances, the giving of an instruction which includes defense of property as an exculpatory ground?

B. Has the *Katz v. United States* test, which bases a determination of whether an intrusion is an unreasonable search on one's subjective expectation of privacy and whether that expectation is objectively reasonable, rendered the "open field" doctrine of *Hester v. United States* obselete?

IV. STATUTE INVOLVED

18 United States Codes Section 111 provides as follows:

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> "Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

V. STATEMENT OF THE CASE

A. Proceedings

On November 29, 1974, Petitioner Charles Stewart Stoll was charged by criminal complaint with the assault of three Drug Enforcement Administration agents, in violation of 18 U.S.C. § 111 (Record on Appeal at 3, hereinafter referred to as R). On January 8, 1975, Mr. Stoll appeared before a grand jury investigating his alleged criminal activities. No indictment was returned. The same grand jury later heard additional evidence without recalling Mr. Stoll, and on January 23, 1975, indicted Petitioner for the alleged violations of 18 U.S.C. §§ 111 and 1114. (R at 8).

At his initial appearance on December 2, 1974, Mr. Stoll appeared with counsel. (R at 1). On December 12, 1974, Mr. Stoll changed counsel with the approval of the United States Magistrate. (R at 9-10). On February 5, 1975, new counsel entered appearance (R at 12), but on May 27, 1975, Mr. Stoll asked to appear *pro se*. (R at 16-19). The record on appeal does

not reflect an order allowing a *pro se* appearance, but from June 12, 1975, until August 22, 1975, Mr. Stoll appeared without counsel.

A jury found Mr. Stoll guilty as charged on August 6, 1975. (R at 72). Mr. Stoll filed a motion for judgment of acquittal pursuant to Rule 29(c), Federal Rules of Criminal Procedure, and for new trial on August 12, 1975. (R at 79, 82). At the District Court's urging, (R at 73), Mr. Stoll retained counsel to appear on August 22, 1975. (R at 88). The motion for judgment of acquittal was denied on December 22, 1975. The motion for new trial was denied on January 20, 1976. (R at 117). Judgment and sentence were entered on February 18, 1976. (R at 20). Mr. Stoll was fined two thousand dollars and placed on unsupervised probation for three years.

B. Facts

Introduction

The events in this case epitomize the peculiar effect that drug law enforcement occasionally has upon well-intentioned and uninvolved citizens. In this case, undercover drug enforcement agents with the solicited assistance of local deputies deceived an innocent citizen. Together, they led the citizen, Petitioner Stoll, to believe that there were no federal agents in the area. The undercover agents, in unmarked vehicles, invaded the citizen's property late at night. The citizen, consistent with an honest belief that he was protecting his property, held the agents at bay until the arrival of uniformed law enforcement officers. For his involvement in this curious series of events, Petitioner was charged with and convicted of assaulting federal undercover officers.

The Setting

The events of this case took place in and around Oatman, Arizona, on November 27, 1974. Oatman is located some 200 miles northwest of Phoenix, (*Transcript of Trial Proceedings*, Vol. A. at 131, hereinafter cited as TA), and boasts a permanent population of seventy-five. (TA at 291). The town has one narrow main street, about five-hundred feet long, occasionally congested with burros, people and automobiles. (TA at 291). The nearest sheriff substation is thirty-five miles away, in Bullhead City, Arizona. (*Transcript of Trial Proceedings*, Vol. B. at 25, hereinafter cited as TB).

Approximately three-quarters of a mile south of Oatman, the Petitioner, Mr. Stoll, owns and operates five mining claims known as the White Chief Mine. (TA at 359). The property includes a short dirt airstrip and various sheds around the mineshaft containing mining equipment, spare parts and supplies worth several hundred thousand dollars. (TA at 359, TB at 21, 23). The property is posted with "Keep Out" and "No Trespassing" signs. (TA at 247) (Exhibits A and B). Mr. Stoll also leases mining properties three miles further south of Oatman, known as the Vivian Mine. (TA at 360).

The Theft Investigation

On the morning of November 27, 1974, Mr. Stoll telephoned the Mohave County Sheriff's Office in Bullhead City, Arizona, and asked for assistance in the

investigation of the theft of heavy duty batteries from his drilling rigs at the Vivian Mine. Stoll and his friend, McKenna, had discovered the theft that morning. (TA at 280). This was the second theft of batteries from the Vivian Mine within a month and a half. (TA at 287, 369).

Deputy Sheriff Larios met Stoll and his friend McKenna, at Stoll's house, and the three began their investigation. On the way out of town, they first stopped at the White Chief Mine. (TA at 278, 279). After determining that nothing was missing at the mineshaft site, they proceeded to leave the White Chief. Just outside the gate, they met two longhaired men in a car bearing Colorado license plates. (TA at 282). The men, Valentine and Hanson, who Stoll presumed to be tramp miners, asked Stoll about the location of a "King" mine, unknown to Stoll or McKenna. (TA at 284). Hanson then went back to Larios' patrol car, identified himself as an undercover federal narcotics agent, and asked Deputy Larios about the ownership of White Chief airstrip. Larios told them he did not know who owned the airstrip. Hanson then arranged to meet Larios at 12:30 that afternoon. (TA at 114). Mr. Stoll heard none of this conversation.

The Sham Stop

Larios, McKenna and Stoll proceeded to the Vivian Mine to investigate the previous night's losses. Shortly after noon, Deputy Larios left Stoll and McKenna at the Vivian Mine, where the two proceeded to look for fresh tire tracks. Larios then rendezvoused with the federal agents, Valentine and Hanson. Uniformed Mohave County Deputy Sheriffs Knowles and Tracy, seated in a second patrol car, were present at the road-

side meeting site. The deputy sheriffs parked their cars on either end of the unmarked federal car. The agents then identified themselves to Deputies Knowles and Larios. Seeing Stoll's vehicle approaching, Hanson told Knowles to turn on the patrol car's flashing lights, put Valentine and Hanson against the car and pretend to pat them down. (TA at 108, 115). Stoll and McKenna stopped. Deputy Larios approached Stoll and explained that Knowles had stopped these two men for speeding, and had found marijuana seeds in their possession. (TA at 93). Deputy Knowles then approached Larios and Stoll. Knowles told them that the marijuana seeds he found were insufficient to support an arrest, and that the two unidentified men were looking for a place to land an airplane. (TA at 109). Stoll asked if the deputies had found any stolen batteries in the stopped car. Having received a negative response, Stoll then left. (TA at 93).

Further Deception

Still upset about the loss of his batteries from the Vivian Mine, Stoll spent the afternoon with McKenna investigating the thefts. The two visited tire dealers in Mohave Valley, thirty-five miles away, in an attempt to match up the tire prints. During the course of their investigation, they passed the Vivian Mine entrance about 2:30 p.m. They noticed two "latin-type" men, later identified as federal agents Madrid and Ayala, in a green unmarked car with Colorado plates. (TA at 288, TB at 73). Stoll and McKenna stopped and asked the two men what they were doing. The two suggested that they were looking to "just do a little target practice." (TA at 48, 288). McKenna heard a click which sounded like a radio, and told Stoll he heard some-

thing. (TA at 288). Stoll exchanged a few words with the men, and then drove on.

Still later in the afternoon, Stoll and McKenna noticed and recognized Valentine and Hanson as the two men they had earlier seen stopped by the sheriffs. The two were at a phone booth in Oatman. Stoll approached and told them that if they were waiting for an airplane, his was the only airstrip nearby, and that they would need his permission to use it. After Valentine denied that they were waiting for an airplane, Stoll walked off.(TA 115, 289, TB 129).

Arrival of Paulsen

The Sugarfoot Cafe is located about halfway between the White Chief Mine and the town of Oatman. About 4:30 p.m. an automobile pulled up to the Sugarfoot. A man alighted, carrying a two-way radio and two drawstring bags. (TA 323,324). The proprietress of the Sugarfoot, Mrs. Stein, went to the door to ascertain what the man was doing behind her car. The man approached a side door, with his radio "on loud and clear," and showed her a federal agent's badge. (TA 326). Mrs. Stein assumed he was a federal agent and let him in. The man appeared extremely nervous, and hid his radio behind the counter without turning it off. (TA 326). He took a handgun out of a bag and stuck it in his belt underneath his coat. (TA 327). He said that he had wrecked his car on the way to Oatman, and asked Mrs. Stein where the best view of the local airstrip was. She directed him to a front booth. When two local men came in about 5:00 p.m., the stranger grabbed his radio and was directed by Mrs. Stein out the back door. (TA 329). He headed across the desert toward the White Chief Mine. (TA 329). This furtive

character was identified by stipulation as Mr. Paulsen, acting head of the federal agents assembled in Oatman on that day (TA 324).

Mr. Stoll arrived at the Sugarfoot Cafe minutes later, where he was told by Mrs. Stein of Paulsen's conduct. She asked Stoll if he was aware that federal agents were in the area. (TA 330). Stoll replied negatively, stating that federal agents don't act in the manner she described, (TA 331), and suggested that the alleged agent might be a marijuana smuggler. (TA 331). Mrs. Stein agreed that Paulsen's activities weren't those of a proper undercover agent. (TA 332). Stoll left and went home.

McKenna's Warning

Hansen and Valentine, in the meantime, had decided that they were becoming a bit too visible in the town of Oatman. They parked their unmarked car on an Oatman side street to wait for radio word of the expected airdrop of marijuana. (TA 121). Unfortunately they parked directly in front of McKenna's house. McKenna heard doors slam, and ran out to see who was there. He saw a car backed up in his driveway. He exchanged salutations with one of the men, and then went inside to tell his wife that he was going to investigate additional strange occurrences. (TA 290). The agents had received word by radio that an aircraft had landed at the White Chief Mine, and had left while McKenna was inside the house. McKenna followed several suspicious cars around Oatman before reporting these events to Stoll. (TA 291). Stoll then called the Sheriff and asked for assistance. (TA 292).

The Drop-Off

Undercover agents Paulsen, Madrid and Ayala had been watching the White Chief airfield from a nearby hill since 5:00 p.m. (TA 25). Undercover agent Chittendon was watching the airfield from another location. (TA 65). About 5:30 p.m., the agents observed an airplane land at the White Chief, remain at one end of the airstrip for four or five minutes, and then take off. (TA 26). There was no testimony to indicate that the agents knew that there was marijuana unloaded at the airfield at this time. (TA 67-63). A Chevrolet pickup with a camper top was seen on the airstrip approximately ten minutes before the plane landed. A few minutes after the plane took off, the pickup left the property and drove southward. (TA 27, 54). Valentine, Hansen, Madrid and Ayala followed the pickup. They stopped and arrested the occupants miles away from the White Chief at approximately 7:30 p.m. The truck contained no marijuana. (TA 50). The agents then received word from Las Vegas that the aircraft had landed and had been found to contain marijuana debris. (TB 148). There was no evidence that the federal agents notified the local sheriffs of these arrests, or solicited their help to stabilize the situation at Oatman or the White Chief airstrip.

The Billings Investigation

Mohave County Deputy Sheriff Billings received a call at his residence in Bullhead City about 6:00 or 6:30 p.m., from Stoll, who had reported that he was armed and leaving his residence to investigate the Oatman situation. (TA 349). Deputy Larios was spending the night at Billings' house, and testified that they were told that Stoll was "raising heck about all kinds

of strange people in town, a bunch of Mexicans in town." (TA 95). Deputies Billings and Larios drove the thirty-five miles to Oatman and met Stoll and McKenna at the White Chief Mine gate. (TB 23). Stoll asked Billings to accompany him to listen to Mrs. Stein's unbelievable story about a furtive federal agent. (TB 24). They then adjourned to the Sugarfoot Cafe.

Outside the Sugarfoot, Stoll asked Billings if he knew anything about federal agents in the area. (TA 96). Mrs. Stein told Billings about seeing a helicopter in the area at about 5:30 p.m., and told of her encounter with Paulsen. (TA 337). Mrs. Stein said that Billings twice denied any knowledge of federal officers in the area. (TA 337). Billings told Stoll that he would investigate. (TA 353, TB 25). Deputy Larios was present during this entire exchange, and made no attempt to clarify the situation. (TA 96). Stoll went home and had dinner. (TA 338).

The Intruders

At about 9:30 p.m., agents Madrid and Ayala returned to the White Chief Mine, from the scene of the arrest of the occupants of the Chevrolet camper. (TA 28). They drove on to the landing strip and found a three-foot high pile of marijuana. They radioed the news of this discovery to the other agents, and awaited their arrival. (TA 29). Despite their earlier deceptive collaborations with the local deputies, there is no evidence that the agents then undertook to notify the sheriff's office of the resolution of the case. About 9:45

p.m., Chittendon and Paulsen arrived in a second vehicle, while Hanson drove up in the seized pickup. (TA 30, 70, 123).

At 9:30 p.m., Stoll decided to make one more trip past the White Chief Mine before going to bed. He stopped by the Sugarfoot to ask if Mrs. Stein had seen any more suspicious characters. She told Stoll that his wife had just called, relaying word that friends had seen lights at the White Chief Mine. (TA at 25). Mrs. Stoll had also called McKenna and asked him to accompany Stoll to the mine. (TA at 298). McKenna and Stoll met at the Sugarfoot Cafe and proceeded to the mine. They noticed that the gate had been pulled down. Stoll told McKenna, "We got them, Bob." (TA at 298). They proceeded to the mineshaft, but found nothing awry. Just as they were about to leave, McKenna noticed noise and a light down by the airstrip. (TA at 299, TB at 26). They began to approach the light, when they saw the headlights of another car and a pickup coming through the gate. (TA 299-300, TB 28). They waited until these vehicles stopped, and then approached. (TA 301, TB 28).

The Airstrip Incident

Stoll and McKenna approached the intruders gathered on the airstrip with vehicle headlights off. (TA 301, TB 28). When they got reasonably close, Stoll turned on the headlights, jumped out, yelled "freeze!" and turned his shotgun on the gathered intruders. (TA 71, 301, TB 28).

The intruders immediately attempted to identify themselves as federal agents. (TB 29). Stoll saw by the reflection of his headlights that some of the men were armed. (TB 80-81). He refused to let them approach to identify themselves. Stoll knew that if the intruders saw his old shotgun, his advantage of surprising the men with a ready weapon would be lost. (TB 83). Given the intruders' numerical advantage, Stoll made no attempt to disarm them. (TB 82). He recognized Hanson as one of the suspects he had seen stopped by the deputy sheriffs earlier. (TB 30, 63, 190).

Stoll began to stall for time. He hoped his wife had called the sheriff to advise them of the situation. (TB 31). Given the previous representations by deputy sheriffs about these men, Stoll now wanted uniformed law men that he knew and trusted to come and identify these intruders. (TB 58-59). At his request, McKenna looked at various identification cards and badges offered by the agents. McKenna said they looked authentic. (TA 32, 73). Stoll said they could be purchased in Mexico for a quarter. (TA 32). Stoll never personally saw any identification.

Stoll admitted that, in the course of stalling for time and realizing his hopeless tactical position, he might have said just about anything. (TB 86). He did not deny that he asked the agents for warrants, (TB 88), for a bond for property damage, (TB 86), or restitution for property damage. (TB 106). Stoll saw the antenna on one of the unmarked cars, and asked the intruders to prove who they were by calling the sheriffs. (TB

66). The intruders responded that their radio was set on federal frequency, and could not reach the deputies. (TB 66).

At some time during this confrontation, Paulsen radioed agent Valentine, who was approaching in another car, to warn him of the situation. (TB 131). Valentine testified that he received this warning, approached and joined the group with his gold drug enforcement badge clipped on the buttonhole of his jacket. (TB 132).

Stoll then decided that he and McKenna would be considerably safer out by the gate than at their present location up in the hills. He told the intruders that he was half convinced that they were federal agents, (TA 52), and let them load the marijuana while he beat a tactical retreat.

The Gate Incident

Stoll drove to the gate and blocked the entrance by parking his vehicle across the road, (TA 138). Minutes later, the agents approached. They had armed themselves with M-1 rifles. (TA 133). Again, the same identification attempts were made by the agents and disregarded by Stoll. He still insisted on assurances from a trusted, local law man. Stoll agreed to let agents Paulsen and Valentine accompany McKenna to the Sugarfoot Cafe to call the sheriff's office. (TA 135).

Arrival of Sheriff

At approximately 11:00 p.m., Mohave County Deputy Sheriffs Friend and Tracy arrived at the White Chief gate to investigate possible trespass. (TA 138). Just as Deputy Friend got out of the patrol car, Tracy told him that these men were possibly federal narcotics agents. (TA 210). Friend walked up to Stoll and asked what the situation was. (TA 210). Stoll told Friend that he had caught some trespassers who were also possibly smugglers. (TA 196). Friend solicited and checked identification, and then asked Stoll to put his gun down. (TA 195, 202). Stoll unloaded the shotgun and immediately gave it to Friend. (TA at 197). Deputy Friend gave the shotgun back to Stoll and advised him to move his vehicle. Stoll did so, suggesting that the agents were still trespassers. (TA at 198, 212).

Denouement

Stoll left the scene and proceeded into town, where he found Paulsen on the telephone. He walked up to the telephone booth and was arrested by Paulsen and Valentine. (TA at 232).

The agents took Stoll that night, Thanksgiving eve, through Kingman to Phoenix. (TA at 233). In handcuffs at a Kingman hamburger stand, Stoll denied assaulting anyone, and bragged, according to agent Valentine, that he had "just felt it necessary to teach you guys a lesson." (TB at 145). Stoll denied making this statement. (TB at 105). Mr. Stoll was subsequently charged with assulting undercover agents, Paulsen, Hanson and Valentine. (R at 3, 8).

Stoll is No Smuggler

In his opening statement, the prosecutor made it clear to the jury that Mr. Stoll had nothing to do with the marijuana left on his airfield the night of November 27, 1974, and that Stoll was not involved in a narcotics conspiracy nor in the importation of marijuana. (TA at 22-2). Moreover, the trial judge instructed the jury that there was no evidence in this

case involving Mr. Stoll in any way with the importation of marijuana. (TB at 201).

VI. REASONS FOR GRANTING THE WRIT

A. With respect to Question A, Part III hereof, the writ should be granted because the Ninth Circuit Court of Appeals has decided this issue in a way that conflicts with the applicable decisions of this Court.

In March of 1975, the United States Supreme Court thoroughly considered the *mens rea* required for commission of the offense of assaulting federal officers in violation of 18 U.S.C. §111. In *United States v. Feola*, 420 U.S. 671; 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975), the Court held that in order to incur criminal liability under Section 111, an actor need not know the federal identity of his victim, but must entertain at least the criminal intent to assault. The Court suggested that criminal sanctions could be inapplicable

> ". . . where legitimate conduct becomes solely unlawful because of the identity of the individual or agency affected." 420 U.S. 671, 685, 95 S.Ct. 1255, 1264, 43 L.Ed.2d 541, 553.

The Supreme Court continued:

> ". . . The statute does require a criminal intent, and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of *mens rea*. For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant *or his property*. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent."

(emphasis added). 420 U.S. 671, 686, 95 S.Ct. 1255, 1264, 43 L.Ed.2d. 541, 553.

The Petitioner herein requested an instruction which included the defense of property as an exculpatory element under mistake of fact. (R at 37). The District Court found this request to be adequately covered in its intended instructions. (TB at 3). The relevant instruction, as requested by the government, (R at 62), and given by the District Court, (TB at 198), excluded defense of property. The instruction given to the jury read:

> "Knowledge of the identity or official character of a person assaulted is not an essential element of the offense charged. However, if you find that the defendant did not know the official character of the officers, and that because of this he feared grave bodily harm from attack, you must find him not guilty." (TB at 198).

The evidence in this case suggests that Mr. Stoll was at the Sugarfoot Cafe when he heard of possible intruders at the White Chief Mine. (TA at 25). He and Mr. McKenna proceeded to the mine, not out of fear of personal harm, but solely to defend property against thieves. They approached the intruders with this state of mind, obviously intending either to forestall or foreclose thievery. The resistance to reasonably perceived robbery is the only intent and motivation of the assault in this case. As such, it is precisely that sort of legitimate conduct, solely unlawful because of the identity of the victims, which *Feola, supra*, exempts from criminal proscription under Section 111.

The petitioner's theory of the case relies on the conjunction of the exculpatory elements of *Feola, supra.* Both the trial court and the appellate court in its opinion, Appendix A, page 4a, *infra,* determined that the critical issue was whether or not petitioner became or should have become aware of the officer's identity prior to the termination of the confrontation. Certainly if he was or should have been aware of the officer's identity, then neither defense of property nor defense of self would be sufficient to justify petitioner's actions. But assuming that the jury could have concluded that petitioner was not aware nor should he have been aware of this officer's identity, then defense of property is a legitimate excuse of petitioner's actions under *Feola, supra.* For the trial court and the appellate court to conclude that the only issue is the identity of the officers is contrary to this Court's decision in *Feola, supra.*

B. With respect to Question B, Part III hereof, the writ should be granted in order to decide an important question of federal law which has not been settled and which has generated conflict among and within the circuits.

In the instant case, the trial court instructed the jury as follows:

> ". . . When the performance of his duty requires an officer of the law to enter upon private property, his conduct, which might under other circumstances be a trespass, is justifiable.
>
> "The special protections accorded to the people in their persons, houses, papers and effects by the Fourth Amendment to the Constitution of the United States does not extend to open fields.

> Under the evidence in this case, the airstrip and its surroundings come within the definition of an open field.
>
> "Law enforcement officers engaged in the performance of their official duties are not required to obtain a search warrant to enter upon and search an open field." (TB at 200-201).

The appellate court upheld the instruction citing *Air Pollution Variance Board v. Western Alfalfa Corp.,* 416 U.S. 861 (1974), and relying upon the "open field" doctrine first enunciated in *Hester v. United States,* 265 U.S. 57 (1924). Appendix A, *infra,* page 3a.

In *United States v. Freie,* 545 F.2d 1217 (9th Cir. 1976), and the panel of the Ninth Circuit in discussing the meaning of *Katz v. United States,* 389 U.S. 347 (1967) to the "open field" doctrine stated as follows:

> "Ever since that decision *(Katz)*, the determination of whether an intrusion is an unreasonable search has depended on one's actual subjective expectation of privacy and whether that expectation is objectively reasonable. See *Katz, supra,* at 361 (Harlan, J., concurring). Thus, the proper focus is no longer on common law property concepts. See *Wattenburg v. United States,* 388 F.2d 853, 857 9th Cir. 1968). It now appears that *Hester* no longer has any independent meaning but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy." *United States v. Freie, supra,* at 10.

However, in spite of this view by one panel of the Ninth Circuit, the Fifth Circuit in cases such at *Atwell v. United States,* 414 F.2d 136 (5th Cir. 1969) and *United States v. Brown,* 473 F.2d 952 (5th Cir. 1973)

and the Fourth Circuit in cases such as *United States v. Brown*, 487 F.2d 208 (4th Cir. 1973) continue to rely on the "open field" doctrine. In the Seventh Circuit in *United States, ex rel., Saiken v. Bensinger*, 489 F.2d 865 at 868, (7th Cir. 1973) *cert. den.* 417 U.S. 910, treats *Katz* as a mere warning in applying traditional property law concepts.

These circuits draw support for the continued validity of the "open field" doctrine from this court's application of the doctrine in *Air Pollution Variance Board v. Western Alfalfa, supra*, without mention of *Katz v. United States, supra*, or the "reasonable expectation of privacy" test.

Thus, there is a conflict in the circuits as to the effect of *Katz v. United States, supra*, on the "open field" doctrine. This conflict has been exacerbated by this Court's decision in *Air Pollution Variance Board v. Western Alfalfa, supra.*

Had the test stated in *Freie v. United States, supra*, been applied herein, because of the unique circumstances of the case, the jury would have been given the opportunity to determine whether or not petitioner had a subjective expectation of privacy on his airstrip and whether that expectation was reasonable. Instead the jury was instructed, based upon the "open field" doctrine, that the agents had a right to be on the airstrip as a matter of law. If the jury had been given that opportunity the outcome may well have been different.

VII. CONCLUSION

For the foregoing reasons and for the reason that this Court should prevent a miscarriage of justice, it is requested that this Court exercise its discretion and grant the petition for writ of certiorari.

Respectfully submitted this __ day of March, 1977.

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March , 1977

APPENDIX A
DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. CHARLES STEWART STOLL, *Defendant-Appellant.*	No. 76-1448 MEMORANDUM

[January 6, 1977]

Appeal from the United States District Court
for the District of Arizona

Before: WALLACE and SNEED, Circuit Judges, and GRAY,* District Judge.

The appellant, Charles Stoll, was convicted of assault upon a federal officer in violation of 18 U.S.C. § 111. The charge arose from the appellant's resistance to federal drug enforcement agents' entry upon his private airstrip after their observance of an airdrop of 800 pounds of marijuana. There was no evidence that the appellant was involved in the marijuana drop. The appellant contends that his conviction was based

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* Hon. William P. Gray, United States District Judge, for the Central District of California, sitting by designation.

on erroneous jury instructions and that the prosecution improperly withheld a witness' grand jury transcript. He also argues that the evidence was insufficient to support the verdict. We disagree, and affirm the conviction.

I.

The Jury Instructions.

Appellant complains about three distinct parts of the jury instructions although, perhaps because he represented himself at the trial, he made no objection to the instructions when given. The consequence of this failure to object is that to warrant reversal one or more of the defects must constitute plain error. *See United States v. Alvarez*, 469 F.2d 1065, 1067 (9th Cir. 1972).

None of the defects constitutes plain error. While it is true that the instruction which purported to set forth the mistake of fact defense to 18 U.S.C. § 111, which the Supreme Court recognized in *United States v. Feola*, 420 U.S. 671 (1975), did not mention that fear of damage to property could justify resistance to unidentified officials, the record indicates the focal point of the trial was whether the appellant during the confrontation became aware of the identity of the officials. It was not whether the appellant feared damage to his property as well as grave bodily injury. No effort by the Government was made to dispute appellant's evidence tending to show that his original resistance was in defense of himself and his property. The issue was whether he became aware of the identity of the officials prior to the termination of the confrontation. This issue was adequately covered in other instructions. The defect of which the appellant complains

does not constitute plain error. *See United States v. Trejo*, 501 F.2d 138, 140 (9th Cir. 1974); *Medved v. United States*, 411 F.2d 617, 618 (9th Cir. 1969).

The second alleged defect fares no better. In this instance the appellant complains of the following instruction. "Unless and until outweighed by evidence to the contrary, the law presumes that official duty has been regularly performed, ..." His point is that this instruction improperly shifted to him the burden of proving that the officials were *not* engaged in the performance of their official duties whereas an element of the crime with which he is charged, which must be established by the Government beyond a reasonable doubt, is that the official resisted was "engaged in or on account of the performance of his official duties." 18 U.S.C. § 111. *See United States v. Heliczer*, 373 F.2d 241, 245 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967). While the instruction given could have been more precisely drawn, our review of the record convinces us that the Government acknowledged and properly discharged its duty to establish beyond a reasonable doubt that the officers resisted were in the performance of their duties at the time of the confrontation. The complained of charge merely creates the presumption that, once it is shown that an official is engaged in the performance of his duty, it will be assumed that such duties were *regularly* performed.

Finally, the jury was properly instructed on the agents' right to enter onto the appellant's airstrip without a warrant. The airstrip was an "open field" and a reasonable expectation of privacy does not extend "to sights seen in the 'open fields.'" *Air Pollution Variance Board v. Western Alfalfa Corp.*,

416 U.S. 861, 865 (1974). *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

II.

Grand Jury Testimony.

We also hold that the Government did not withhold improperly portions of the grand jury testimony of appellant's corroborating witness. Prior to trial, the Jencks Act precluded discovery because the witness also was a prospective government witness. 18 U.S.C. § 3500(a). *Sandejas v. United States*, 428 F.2d 1040, 1046 (9th Cir.), *cert. denied*, 400 U.S. 879 (1970). Thereafter the appellant made no request. A *pro se* defendant must represent himself; he cannot shift this responsibility to the court. *See United States v. Trapnell*, 512 F.2d 10, 12 (9th Cir. 1975). He is bound by his acts and conduct at trial and is held to his record. *United States v. Dujanovic*, 486 F.2d 182, 188 (9th Cir. 1973).

III.

Sufficiency of the Evidence.

The evidence was sufficient to support the verdict. As already indicated, the appellant's defense was that there was no intent to assault because his acts amounted to nothing more than a reasonable defense of property. While knowledge that the victim of an assault is a federal agent is not a necessary element of the crime described in 18 U.S.C. § 111, *United States v. Feola, supra*, the evidence in this case is sufficient to support a finding that the appellant knew at some point that the individuals he confronted were federal agents. Several times during the confrontation the agents showed or attempted to show their federal identification cards. Even if appellant's confrontation

in its inception was not culpable, the evidence amply supports the conclusion that at some point it became so. Once appellant became aware of the agents' identities, continuing the confrontation made him criminally responsible. *United States v. Sheley*, 447 F.2d 455 (9th Cir. 1971), *cert. denied*, 404 U.S. 1022 (1972); *United States v. Ochoa*, 526 F.2d 1278 (5th Cir. 1976).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, *Plantiff,*	CR-75-38 Phx.
VS.	
CHARLES STEWART STOLL, *Defendant.*	ORDER OF PROBATION

On this 18th day of February, 1976, at Phoenix, Arizona, came the attorney for the Government and the defendant appeared in person and with counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violating Title 18, Section 111 and 1114, United States Code (Assault on a Federal Officer), as charged in the Indictment.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, IT IS ADJUDGED that the defendant is guilty as charged and convicted.

Thereupon, it appearing to the Court that the best interests of the public as well as the defendant will be served thereby, IT IS ADJUDGED that the imposition of sentence herein be and it is suspended and that said defendant be placed on probation for a period of three (3) years without supervision, and fined $2,000.00. Said fine to be paid within sixty (60) days. If an ap-

peal is filed, and filed immediately, the fine will be stayed.

Probation to commence immediately.

United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES STEWART STOLL, *Petitioner,* vs. UNITED STATES OF AMERICA, *Respondent.*	NO. 76-1448 ORDER

Before: WALLACE and SNEED, Circuit Judges, and Gray,* District Judge.

The Petition for Rehearing is denied.

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* Hon. William P. Gray, United States District Judge, for the Central District of California, sitting by designation.